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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 88.

MICHAEL W. O'BRIEN ET AL., EXECUTORS,
COMPLAINANTS AND APPELLANTS,

vs.

JOHN G. WHEELOCK ET AL., DEFENDANTS.

REPLY BRIEF OF APPELLANTS.

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vs.

JOHN G. WHEELOCK ET AL., DEFENDANTS.

REPLY BRIEF OF APPELLANTS.

The additional brief lately filed by former Attorney General Miller for certain of the defendants suggests some new claims of defense, a reply to which may aid the court in its consideration of the case.

I.

His first proposition, that the liens upon the lands of defendants, even if valid, cannot be enforced by a suit in equity, is in the line of the objection made in the main brief for defendants (pages 47 to 55). The defect in this contention is obvious if the peculiar character of the assessments in question is borne in mind. There is no analogy between them and ordinary taxes.

The rule of the supreme court of Massachusetts (which is followed in nearly every other State in the Union) clearly distinguishes the cases of ordinary taxation from special assessments like those in the case at bar. It is concisely stated in Lowell *vs.* Boston, 111 Mass., 454, 468, 469:

"In the statutes for the improvement of meadows the provisions for the assessment and collection of the expenses in form resemble taxation and the powers exercised over private property are sometimes ascribed to the right of eminent domain. But there is no taking for public use. It is a proceeding of a semi-judicial nature in which all those whose lands are affected are joined as parties. The action taken therein relates to that in which all have a common interest or in reference to which all are affected by a common necessity." * * * "We find in these statutes no exercise of the right of eminent domain or of the governmental power of taxation; that which in form resembles taxation is in fact only an equitable apportionment among the parties to the proceedings of the expenses incurred for their common benefit by their common agents, or rather by the officers of the tribunal charged by the legislature with the conduct of these proceedings which it authorizes for the execution of its wholesome and reasonable orders and laws in that behalf made and provided."

It has been settled by the decisions of this honorable court that the liens for ordinary taxes for municipal purposes and assessments for municipal local improvements are not given for the benefit of the creditors of the municipality, but are created for the benefit of the public authorities to enable them with greater certainty and facility to collect the tax without the embarrassment of other claims against the property taxed (Barkeley *vs.* Levee Com'rs, 93 U. S., 258, 265).*

The assessments here in question are neither taxes for the expenses of a municipality or for local municipal im-

*Although this was a proceeding against levee commissioners, it was not an attempt to enforce levee assessments, but to compel by mandamus the *levy* and collection of a tax to satisfy a judgment against the board of levee commissioners.

provements. They are not *ad valorem* taxes, but are separate assessments of specific, but varying, amounts on different parcels of land according to the particular benefit which each parcel receives from the levee improvement.

These amounts have not been imposed *ex parte* by taxing officers, but at every step in the proceeding to ascertain their justness and amount the land-owners have had notice and opportunity to contest them in a court of competent jurisdiction. Not having done so, they must be deemed to have consented to their correctness. They are still reaping the benefits of the levee which the proceeds of the bonds have constructed. What, then, stands in the way of a court of equity to enforce the assessments?

The remedy of foreclosure and sale is a time-honored function of such a court and is most appropriate here.

The levee commissioners are the trustees of complainants, but they refuse to do their duty, and have colluded with the land-owners to continue the latter in the possession and occupancy of the levee and at the same time to prevent the collection of the assessments.

In cases at law, where the equities were not so strong as in this case, this Court has implied an equitable assumpsit on the part of municipalities to repay the moneys which they had raised by unauthorized bonds and expended for the benefit and upon the property of the municipalities.

Louisiana *vs.* Wood, 102 U. S., 294.

Read *vs.* City of Plattsmouth, 107 U. S., 568.

If a court of law can imply an agreement to repay the money in these cases, cannot a court of equity imply an agreement to admit the validity of the assessments in this case?

I respectfully submit that there is no rule of law or in equity which prevents a court of equity in this case enforcing by decree and sale the assessments on the lands of those defendants who have estopped themselves to assail the law and who have colluded with the drainage commis-

sioners to retain possession of the levee and at the same time prevent the payment of the bonds. On the contrary, every principle of equity and good conscience demands it.

II.

The second subdivision of the additional brief raises for the first time the objection to the Illinois drainage statute that—

"It leaves amounts and times of payment of assessments to discretion of the court."

The particular section which it is claimed is open to this objection provides:

"SEC. 27. At the time of confirming such assessment it shall be competent for the court to order the assessment of benefits to be paid in instalments of such amounts and at such times as will be convenient for the accomplishment of the proposed work." * * *

It is claimed that "the legislature herein attempts to delegate to the court the power in its *discretion* to fix the amounts and times for the payment of the assessment," which it is said is beyond the power of the legislature.

It is respectfully submitted that the counsel again confound the true character of the assessments here in question with general taxes or assessments; but, passing that, it is obvious that the claim of counsel in this case that "different amounts might be fixed by the court in each county in the State where such work shall be undertaken, and different times of payment, as well as amounts for different improvements in the same county, and different amounts for different parties under the same improvement," can be no valid objection to the law. The entire scheme of statutes of this character is that different parcels of land shall be assessed for different amounts according and in proportion to the benefit which they receive from the pro-

posed levee or system of drainage (Hagar *vs.* Reclamation District, 111 U. S., 701). It is impossible to construe the statute, whether valid or invalid, as having any other purpose or intention.

Reference is made in the briefs of all the counsel to the amendment to the Illinois constitution in 1875 and the levee law passed thereunder in 1879. The language of section 26 of this act (Revised Statutes of Illinois, 1880 (Hurd), page 437) is identical with the language in section 27 of the drainage act of 1871 here in question. This act of 1879 was repeatedly attacked, but was sustained by the supreme court of the State of Illinois in Blake *vs.* The People, 109 Ills., 504, and in Huston *vs.* Clark, 112 Ills., 344.

III.

A third subdivision of the additional brief is devoted to the proposition that "law cannot be made by estoppel."

No such contention is made by the complainants in this case. The cases cited in the main brief of the complainants are so numerous and so authoritative that it seems scarcely necessary to reopen the discussion.

Daniels *vs.* Tierney, 102 U. S., 411, Ferguson *vs.* Landrum, 1 Bush, 548, and 5 Bush, 230, are sharply, if not sarcastically, criticised in the briefs of counsel. But the principles of these decisions are sustained by the overwhelming weight of authority.

South Ottawa *vs.* Perkins is again cited and quoted, which is my excuse for calling the attention of the Court to the radical difference between the principle therein announced and the one contended for by defendants. The sole question in South Ottawa *vs.* Perkins was whether a law *had in fact been passed by the legislature of Illinois.* The contention arose upon the facts shown by the legislative journals, one side claiming and the other side denying that a majority of all the members-elect in each house

of the General Assembly had voted for the law. The supreme court of Illinois had held that a statute of the State was not a law unless the legislative journals showed it to have been passed by a majority of all the members. The Supreme Court of the United States held that a State might by its constitution and laws prescribe what shall be conclusive evidence of its statutes, and that while, on general principles, the question of the existence or non-existence of a statute is a judicial one, it must, when it arose in the courts of the United States, be decided by them on evidence legally applicable under the laws of the State without taking the advice of a jury on the subject. They further concurred with the supreme court of Illinois, which had so held in two cases, that the act in question was never passed and was not an act of the legislature of that State.

In the case at bar there is no dispute but that the statute in question was in fact enacted, and the questions here arise solely upon its construction and validity. The distinction is clearly stated in Wilkes County *vs.* Coler, 180 U. S., 506–519:

"In view of the cases determined by the highest court of North Carolina involving the precise point now under consideration, was the circuit court of the United States justified in holding the acts of 1868, 1879 and 1881 to be laws of the State? Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose. May a Federal court disregard the decisions of the highest court of the State holding that such enactment in the form of a statute was never passed, so as to become under the State constitution a law? These questions have been so distinctly answered in this court in cases heretofore decided that a discussion of them upon principle is unnecessary."

Referring to—

South Ottawa *vs.* Perkins, *ubi supra.*
Post *vs.* Supervisors, 105 U. S., 667.
Field *vs.* Clark, 143 U. S., 649.

Under his claim that law cannot be made by estoppel, counsel cite a number of cases holding that there was no estoppel in contracts *ultra vires*. But the case at bar is not a case of *ultra vires*. Whenever a corporation executes a contract which is *ultra vires* it violates positive law. It seeks to do that which the courts declare public policy will not allow it to do. As said by Mr. Justice Peckham in Pullman Car Company *vs.* Transportation Company, 171 U. S., 161 (relied upon by counsel for defendants):

"While the company might not have incurred any moral guilt, it has violated the law by making an illegal contract and one which is against public policy and it must take such consequences as result therefrom."

The cases of railroad company leases cited by counsel involve the question of *ultra vires*, and turn on the want of power of a railroad corporation to absolve itself from the performance of its obligations without the consent of the legislature.

Oregon Railway Co. *vs.* Oregonian Railway Co., 130 U. S., 23.

In Thomas *vs.* Railroad Company, 101 U. S., 71–85, the lease of a railroad by one company to another where the organic act of the company did not expressly permit it, is said to be "a contract unauthorized by the charter and *forbidden by public policy*."

In Railway Companies *vs.* Keokuk Bridge Company, 131 U. S., 371–384, one of the reasons given by Mr. Justice Gray "why a corporation is not liable under a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the legislature and varying from the objects of its creation as declared in the law of its organization," is:

"The interest of the public that the corporation shall not transcend the powers granted."

In the case at bar no question of *ultra vires* arises. In the language of the supreme court of Kentucky in Ferguson *vs.* Landrum, 5 Bush, 230:

"In procuring the money and obtaining with it volunteers such parties violated no law of morality or of the Government. Their contract was not void for want of consideration or illegality, but it is the means by which the sum for its reimbursement is to be raised that they assail."

So here, in procuring the money to construct the levee and with it to protect their lands, the land-owners violated no law of morality or of the Government, nor did the bondholders in lending the money, nor the contractors in building the levee, nor was their contract for the construction of the levee void for the want of consideration or illegality, but the land-owners now assail the means by which the sum to reimburse the bondholders is to be raised.

IV.

The claim under the fourth subclaim of the additional brief that "the benefit is only indirect and common to all" is based upon a misapprehension of the facts in the case.

The levee is made upon the lands of the various defendants and directly protects their other lands, and each parcel of land is specifically assessed for the particular amount which the levee benefits it. The cases cited by counsel were decided upon very different facts.

V.

Another ground of objection by the defendants, now raised for the first time, is that "there can be no estoppel because the contract was made and the bonds were issued in violation of a statute."

The claim is that the commissioners, instead of selling

the bonds, entered into a contract for the construction of the levee and paid for the work thereunder by the bonds, which it is claimed is not authorized by section 35, giving the commissioners power to borrow money and secure the same by bonds. Counsel rely on the New York cases cited by him and Rogers *vs.* City of Burlington, 3 Wall., 654. The New York statute expressly required the township officers, acting as commissioners, to sell the bonds for par. Section 3 of the act (Laws of New York, 1868, page 1130):

"The city commissioners * * * may in their discretion dispose of such bonds * * * and upon such terms as they shall deem most advantageous for their said town, but not for less than par."

There is no such restriction in the Illinois statute. The New York act contemplated the borrowing of money by the officers of the town upon the bonds of the township and the investment of that money in the stock of the railroad company. Instead of borrowing the money the township officers delivered the bonds to the company in payment of *stock at its par value*—a very different matter. After this action by the township officers and before the decisions in question a decree had been rendered in an equity suit, to which the railroad company and the township and bondholders were parties, directing the return and cancellation of the stock given to the township officers for the bonds.

Moreover, the New York cases and Rogers *vs.* City of Burlington were cases of municipal aid to railroads in which the money was expended upon the property of the private corporations, and the only advantage, if any, which the municipality received was the indirect benefit of having a railroad in its vicinity. This distinction is recognized in Louisiana *vs.* Wood, 102 U. S., 294, and Read *vs.* City of Plattsmouth, 107 U. S., 568, and is clearly stated in the opinion in Hedges *vs.* Dickson County, 150 U. S., 182–186,

in which, referring to the above cases, the court, speaking through Mr. Justice Jackson, say:

"The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist under the case under consideration, where the county received no part of the proceeds of the bonds and no direct money benefit, but merely derived the incidental advantage arising from the construction of the railroad upon which advantage it would be impossible for the court to place a pecuniary estimate or to say that it would be equal to such portions of the bonds in question as the county could have lawfully issued."

It is said by counsel for defendants that no improvement has been made upon the property of the defendants, who are estopped, nor have they received any benefit peculiar to themselves; but we have shown that this is not a correct statement. The levee is built upon portions of the lands of the various defendants. It still remains there and protects their other lands. It is and has been since its construction continuously in their possession through the agents of their own choice.

VI.

In subdivision six of the additional brief, under the head of laches, the statement is made that "from the date of Judge Drummond's decretal order of 1879 up to the date of the filing of the bill in this case no steps were taken."

No reference is made to the date of Mr. Palms' death; nor to the fact that he resided outside of the State of Illinois (Hallett *vs.* Collins, 10 Howard, 184–187), and for a year or two before his death was unable to travel or leave the city of Detroit (Record, p. 373); nor to the fact that no assessment fell due until 1883, and none of Mr. Palms' bonds fell due until July, 1883; nor to the length of time necessary to trace the titles of the lands from the original owners

to the time of the levee assessment to the present holders; nor to the fact that the land-owners had colluded with commissioners of their own choice and had during all this time maintained possession and occupancy of the levee. No proof whatever is made of any changes wrought by the lapse of time in the value of the property and in the situation of the parties such as to render it inequitable to decree the relief prayed.

Willard *vs.* Wood, 164 U. S., 502–526.

The case at bar is radically different from Felix *vs.* Patrick, 145 U. S., 317; Galliher *vs.* Cadwell, 145 U. S., 368–372, and other decisions of this court in the same line. There is no large increase of value in the property as in those cases. The claim of the complainants today in its principal amount is no greater than it was in 1875. The acts of estoppel are matters of record or are proven out of the mouths of the defendants themselves. In Allore *vs.* Jewell, 94 U. S., 506–512, the lapse of six years before suit was held not to be laches, although the complainant knew all the facts, but there was no prevention by the death of witnesses or other causes of a full presentation of the case.

It is unjust to complainants to charge up to them the long period of time which has elapsed during the extended litigation between these parties. The record shows that on May 4, 1878, Mr. Palms filed the original bill in this cause against the commissioners. It was nearly a year (March 13, 1879) before the commissioners answered. Then a year and three months elapsed (July 7, 1880) before a final decretal order was made. Mr. Palms died November 24, 1886. The complainants in this present case were not appointed as executors until 1887. They filed their bill April 22, 1889. Service was as promptly made as was possible under the circumstances, but by leave of the court the defendants did not respond until the 31st of August, 1889, when they filed the demurrers. The demurrers were heard by Judge Gresham and overruled on

the 25th day of April, 1890, and the defendants given ninety days to answer. They did not answer, however, until January, 1891. Complainants took their proofs promptly, but defendants did not close their testimony until the 15th day of September, 1895 (Rec., pp. 55–58). The cause was submitted for decision to District Judge Allen on the 6th day of November, 1895, but no decision was rendered by him until February 5, 1897. An appeal was taken to the United States Circuit Court of Appeals on the 5th day of April, 1897, and the hearing of the cause was concluded on the 8th day of June, 1898. On the 6th of June, 1899, the court filed its decision. On the 14th day of May, 1900, the petition for certiorari was granted by this Honorable Court.

. Of the "seventeen years'"!! delay stated in the brief there is chargeable to Mr. Palms only the period from 1880 to the date of his death in 1886. During all this time he lived without the State of Illinois. During the first three years no assessment fell due which he could take any steps to collect and none of his bonds had matured upon which he could ask payment through assessments. During the last two years he was physically unable to travel. His executors filed the bill in this case within two years after their appointment, before the Illinois statute of limitations (2 Starr and Curtis Anno. Statutes (Ill.), c. 77, § 6, p. 1386) had run against the earliest maturing assessments or bonds and three years before any bonds of the issue of 1875 had matured.

The claim of counsel that the statute began to run from the time of the payment of the money by Mr. Palms is not maintainable. There is no personal liability of any landowner. Nothing can or ever could have been recovered from any of them in a suit at law. The complainants can only recover through the enforcement of the liens of the assessments.

The sole ground of complainants' case is an equitable estoppel. In the language of Mr. Justice Peckham, speak-

ing for this court in Stone *vs.* Bank of Commerce, 174 U. S., 427:

"It is fitly denominated an equitable estoppel because it rests upon the doctrine that it would be against the principles of equity and good conscience to permit the party against whom the estoppel is sought to avail himself of what might otherwise be his undisputed rights."

As to those defendant land-owners, therefore, who are estopped to assert the unconstitutionality of the law, all its provisions and all the doings of the commissioners under it in conformity with its terms are as binding as if the law was valid.

It must follow that, as to them, the bonds are valid instruments in all their terms. If this be so, then they are entitled to the time of payment named in the bonds and in the assessments, and the bondholder can only collect according to those terms.

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